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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Policies and Rules Concerning)	MM Docket No. 93-48
Children's Television Programming)	
)	
Revision of Programming Policies)	
for Television Broadcast Stations)	

SUMMARY OF ARGUMENT

The Commission should not adopt quantitative processing or other guidelines with respect to the telecast of children's educational/informational programming. Congress expressly directed the Commission not to do so, and numerous prior Commission decisions have recognized the constitutional and policy pitfalls associated with specific numerical programming requirements.

Should the Commission nonetheless decide to adopt guidelines, it should do so through adoption of a Policy Statement rather than as informal processing guidelines. Any such guidelines must be reasonable -- for example, one hour of explicitly educational/informational "core" children's programming per week. More significantly, they should be flexible and, as Congress expressly required, allow for various combinations of core

educational/informational programming, short-form educational/informational vignettes, general audience programming and related non-broadcast efforts.

Finally, the Commission should issue a series of questions and answers which would clarify the questions which have arisen with respect to application of the definition of "commercial matter" to real-life situations, particularly issues relating to promotional announcements and station promotions. Such an informational guide would be of immeasurable use to licensees which seek to comply with their obligations but are confused about the specifics of those requirements as they apply to particular circumstances.

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To the Commission:		

JOINT COMMENTS

Cannell Communications, L.P., Cosmos Broadcasting Corporation, Cox Broadcasting, Midcontinent Media, Inc., Multimedia Broadcasting Company, River City Broadcasting, L.P., Tak Communications, Inc., Wabash Valley Broadcasting Corp., Great American Television and Radio Co., Inc., and Scripps Howard Broadcasting Company ["Joint Parties"], by their attorneys, submit herewith their Joint Comments in response to the Commission's Notice of Inquiry in the above-captioned proceeding.^{1/}

Introduction

The Children's Television Act of 1990^{2/} requires stations to serve "the educational and informational needs

^{1/} Notice of Inquiry, MM Docket No. 93-48, FCC 93-123 (March 2, 1993) ["Notice"].

^{2/} Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-100, codified at 47 U.S.C. §§ 303a, 303b, 394 ["CTA"].

of children through the licensee's overall programming, including programming specifically designed to serve such needs."^{3/} Approximately two years ago, the Commission adopted rules implementing the CTA.^{4/} The programming obligations imposed thereby became effective on October 1, 1991.^{5/}

The Notice, issued a mere 15 months later, reflects a Commission concern that licensees are not fully aware of and thus are not fully implementing CTA's mandate: notwithstanding its acknowledgement that "[t]he majority of these [post-CTA renewal applications] demonstrated adequate efforts to meet the programming needs of children...",^{6/} the Commission indicates dissatisfaction with licensees' performance in this area and proposes imposition of quantitative program processing guidelines as a remedy. Such drastic action would be premature: there is an insufficient record upon which to premise restrictive industry-wide regulation.

The Joint Parties share with Congress and the Commission the goal of ensuring that television programming

3/ 47 U.S.C. § 303b(a)(2).

4/ Report and Order, MM Dockets Nos. 90-570, et al., 6 FCC Rcd 2111 ["CTA Report"], recons. granted in part, 6 FCC Rcd 5093 (1991) ["CTA Reconsideration"].

5/ See 47 C.F.R. §73.3526(a)(8)(iii).

6/ Notice at par. 1.

adequately responds to the particular needs of children.^{7/} They submit that a realistic review of the amount and content of children's programming which is on the air now, compared with that which was on the air two years ago, clearly demonstrates that CTA has had and continues to have the effect Congress desired: a substantial increase in the amount and quality of educational children's programming aired by the nation's commercial television stations.

Although the availability of such programs continues to be limited -- quality educational programming which children will actually watch does not just spring full-grown from Jovian program producers -- it is increasing and should continue to increase. Stations are fully cognizant of their new obligations under the CTA and are working diligently to implement them. To say that they have not succeeded after only fifteen months is to be unrealistically impatient. It takes time to develop, fund, produce and market any program, including children's educational programs. The Commission cannot and should not

^{7/} Many of the Joint Parties' stations carried significant standard length children's educational and informational programs, including locally-produced programs, prior to CTA; others have added such programs, as well as syndicated educational children's programs, to their schedule following the CTA. The Joint Parties believe that their stations have aired substantial and significant children's educational and informational programming, both long- and short-form, in full compliance with the letter and the spirit of CTA.

act now: it has an insufficient record of experience upon which to premise drastic restrictive regulatory action.

The Joint Parties also agree with Congress that the best -- and only constitutional -- means of ensuring that those needs are optimally satisfied is reliance upon licensees' good faith discretion. Any other course impermissibly impinges upon First Amendment freedoms, as confirmed by longstanding, consistent Commission refusals to impose quantitative programming requirements.

Quantitative programming guidelines not only raise insuperable constitutional obstacles: they fail to take account of the many variables which enter into programming decisions. Rather than impose quantitative processing guidelines, the Commission should provide specific and detailed examples of the programs which it believes would contribute to satisfying licensees' obligations in this area. In doing so, it should describe both educational and informational programming specifically designed for children and general audience programming, which Congress expressly recognized as having specific educational value.

As Congress directed, however, the selection, mix and scheduling of such programs must be left to the reasonable discretion of individual licensees, reflecting the specific conditions which exist within each particular marketplace and at each individual station. Sanctions

should be imposed only if stations completely fail to provide programming which responds to children's special needs.

In the event that the Commission nonetheless decides to adopt some form of guidelines, this should be done as a Policy Statement rather than as a processing guideline.^{8/} The guidelines should be reasonable and flexible, should allow for a mix of short- and long-form programming and for a mix of general audience and child-specific programming. Licensees' non-broadcast efforts to enhance the value of children's educational/informational programming should be deemed to reduce the amount of programming which is required. Furthermore, broad scheduling discretion must be allowed. Finally, to the extent the guidelines require more than the presentation of one-half to one hour per week of core educational/informational programming, they should be phased in and not become effective until Fall, 1994, in order to permit the development of a greater supply of and the acquisition of additional core programming.

^{8/} Of course, if the Commission adopts internal processing guidelines, it should inform those it regulates of their existence and content.

**The Commission Should Not Adopt
Quantitative Children's Television Program Guidelines**

Even though the statutory requirement for the telecast of educational/informational children's programming is only fifteen months old, the Notice reflects Commission dissatisfaction with licensees' performance. As a remedy, the Commission proposes to impose specific quantitative processing guidelines for the presentation of "core" children's educational programming.^{9/}

Such action would be contrary to Congress' express direction. The CTA's legislative history is replete with expressions of Congressional concern with the adverse constitutional implications of specific programming requirements and a corresponding willingness to rely on licensees' discretion with respect to the amount of programming which is sufficient to satisfy children's programming needs. For example:

The Committee does not intend that the FCC interpret this section as requiring or mandating a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must broadcast to pass a license renewal review pursuant to this Section or any section of this legislation.

...In order to fulfill the obligation imposed under this subsection, each broadcast licensee must demonstrate that it has served the child

^{9/} "Core" children's programming is apparently standard-length programming which is overtly educational and informational in intent.

audience with programming which is designed to meet their unique educational and informational needs, taking into account the special characteristics of various segments of the child population. Under this legislation, the mix is left to the discretion of the broadcaster in this area...^{10/}

We have left the licensee the greatest possible flexibility in how it discharges its public service obligation to children.

The committee does not intend that the FCC interpret this legislation as requiring or mandating quantification standards governing the amount or placement of children's educational and informational programming that a broadcast licensee must air to pass a license renewal review pursuant to this legislation.^{11/}

Of course, it is expected that the FCC, in evaluating the licensee's compliance with this provision, will defer to the licensees judgement [sic] to determine how to serve the educational and informational needs of children in its community.^{12/}

Commission adoption of program processing guidelines as the result of this proceeding would thus disobey Congress' clear direction.

^{10/} H.R. Rep. No. 101-385, 101st Cong., 2d Sess. (1990) ["House Report"] at 18.

^{11/} 136 Cong. Rec. S10121, S10122 (daily ed. July 19, 1990) (Remarks of Mr. Inouye).

^{12/} Id. at S10127 (Remarks of Mr. Wirth).

It would also be unconstitutional.^{13/} The Commission has repeatedly refused to adopt quantitative standards to govern the presentation of particular types of programming based upon its recognition of the constitutional frailty of any such requirements.^{14/} More specifically, it has expressly recognized the constitutional pitfalls inherent in any system of specific requirements for the airing of children's educational programming.^{15/} Neither the constitution, the First Amendment nor Section 326 of the Communications Act, as amended, have been changed since these decisions. The constitutional concerns they reflect remain as valid today -- if not more so^{16/} -- as they were

^{13/} See Letter to Robert C. Byrd from Thomas M. Boyd, Hearings before the Subcommittee on Telecommunications and Finance, House Committee on Energy and Commerce on H.R. 1677, 101 Cong., 1st Sess. (Ser. No. 101-32) at 167, expressing the opinion of the U.S. Department of Justice that children's programming obligations are unconstitutional.

^{14/} See, e.g., Standards for Substantial Program Service, 40 RR 2d 763 (1977), aff'd sub nom., National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978); Memorandum Opinion and Order, BC Docket No. 79-219, 87 FCC 2d 797, 809, 819 (1981), aff'd sub nom., Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983).

^{15/} Report and Order, Docket No. 19142, 96 FCC 2d 634 (1984), aff'd sub nom., Action for Children's Television v. FCC, 756 F.2d 899 (D.C. Cir. 1985).

^{16/} The spectrum scarcity argument upon which many restrictions upon broadcasters' First Amendment rights have been premised has increasingly been called into question. See, e.g., Telecommunications Research and Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986).

when first articulated. Program quotas, even if expressed as processing guidelines,^{17/} would clearly offend the constitution.

Licensee Discretion Should be Substantial

The Notice reflects an emphasis on standard length "core" children's programming, suggesting that the Commission may focus exclusively on such programming in evaluating compliance with CTA's requirements. This apparent disparagement of other programming's value for children conflicts with the CTA's specific language and its legislative history, which reflects Congress' recognition that a wide variety of programming, not limited to long-form specifically educational/informational programming, can have a positive impact on children's growth and development.

The CTA requires the Commission to consider licensees' service to children's educational and informational needs through their "overall programming;" it also expressly directs the Commission to consider

- (1) any special nonbroadcast efforts by the licensee which enhance the educational and informational value of such programming to children; and
- (2) any special efforts by the licensee to produce or support programming broadcast by another station in the licensee's marketplace

^{17/} The Commission must candidly acknowledge that if it adopts processing guidelines, virtually every television station in the country will adjust its programming practices to conform to them to avoid the expense and delay associated with variances from the Commission's expectations.

which is specifically designed to serve the educational and informational needs of children.

Further, the CTA's legislative history is replete with references to the wide variety of programming which stations may air in fulfillment of their statutory obligations:

We recognize that there is a great variety of ways to serve this unique audience -- including programming specially designed to entertain and inform children; family and adult programming that can also contribute to the information needs of children; and cooperative efforts with noncommercial stations to produce and present educational fare. The list can be extended as far as the imagination of the creative broadcaster and must rely on the good-faith, dedicated judgment of the broadcaster.

The committee notes that general purpose programming, including programming that is not subject to the commercial guidelines under section 3, can have an informative and educational impact [citation omitted] and thus can be relied upon by broadcast licenses [sic] as contributing to meeting their obligation in this important area.^{18/}

At the same time, broadcasters can also count among their service to children programs primarily intended for general audiences which also serve the needs of children. It would be arbitrary and against common sense to suggest that such efforts hold no value for children.^{19/}

The Committee believes that a broad range of programming will meet the standard of service to the child audience required by the Section. The Committee notes that general purpose programming

^{18/} 136 Cong. Rec. S10121, S10122 (daily ed. July 19, 1990) (remarks of Mr. Inouye).

^{19/} 136 Cong. Rec. S10126 (daily ed. July 19, 1990) (remarks of Mr. Wirth).

can have an informative and educational impact [citation omitted] and thus can be relief upon by the broadcaster as contributing to meeting its obligation in this important area.....Under this legislation the mix is left to the discretion of the broadcaster...^{20/}

Congress thus repeatedly recognized that much programming, even if not overtly educational/informational in intent, can further children's positive development. Stations' news programs, for example, perform a significant educational/informational function, particularly for older children who will soon be adults working in and influencing the world which news describes. Many network public affairs programs, such as "Sixty Minutes" and "48 Hours," as well as similar locally-produced public affairs programs, likewise inform and educate older children; indeed, it is not uncommon for such programs to be required viewing for junior high or high school social studies or history courses. In other words, these public service programs, although not specifically directed to the child audience, nonetheless have significant educational and informational value for children,^{21/} particularly older children, and therefore

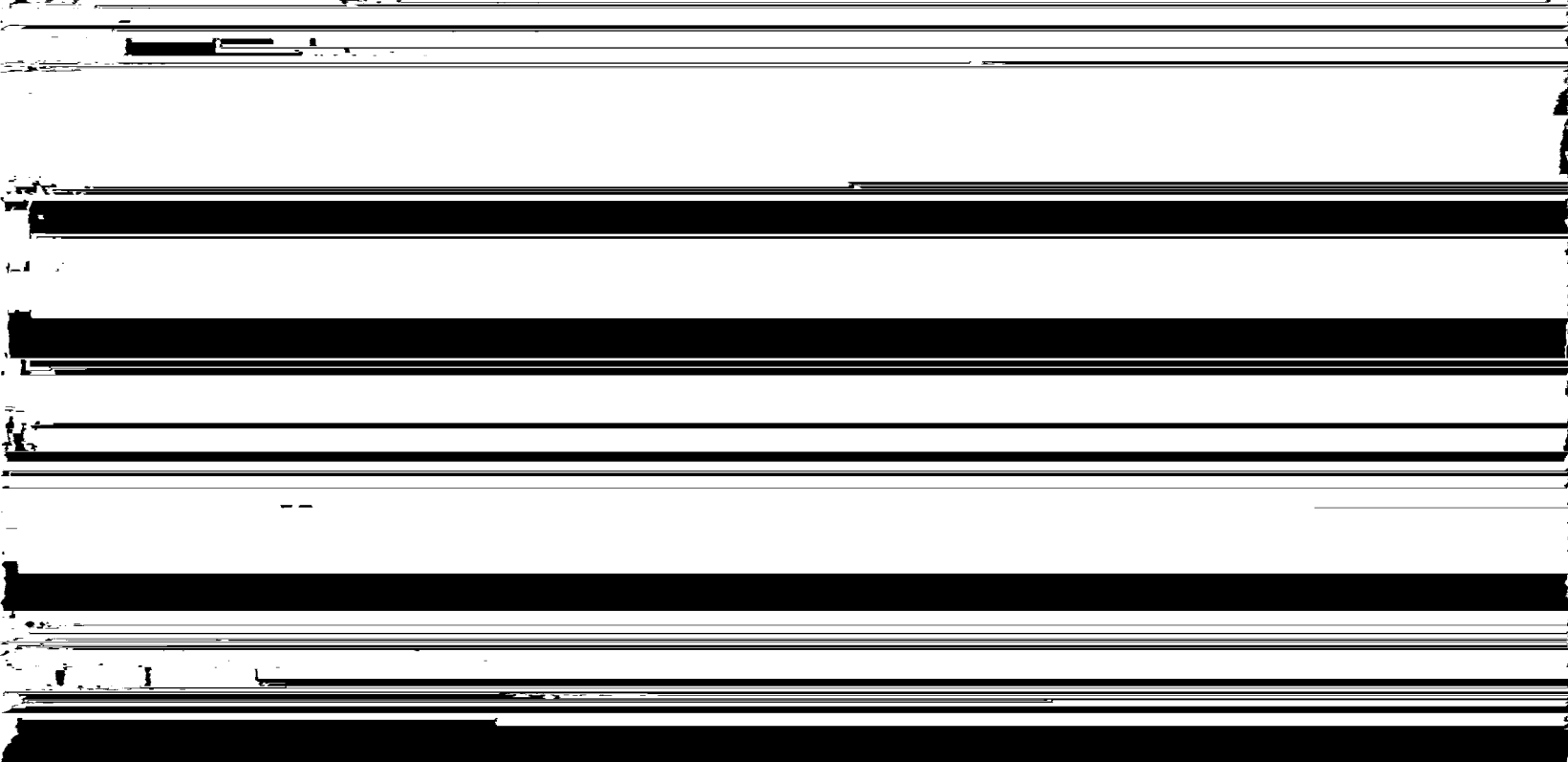
^{20/} H.R. Rep. No. 101-385, 101st Cong., 2d Sess. (1990) at 17.

^{21/} Given their choice between having their child watch a news or public affairs program or an entertainment, it seems clear that parents would prefer the former, an indication of the positive impact such programming can have on children.

clearly can be relied upon by stations as part of their compliance with CTA.

The Commission's apparent narrow focus on core children's programming cannot be reconciled with Congress' unambiguous command that the Commission's review of licensees' children's programming efforts must encompass a wide range of programming such as news and public affairs programs as well as associated non-broadcast efforts. While the licensees agree that "some" standard length core programming must be aired, the amount of such programming which has been suggested^{22/} appears to go far beyond what Congress had in mind when it enacted the CTA.^{23/}

The Joint Parties urge the Commission to eschew establishment of minimum required amounts of standard length core children's educational/informational programming. The amount of such programming should instead be left to the



shorter length children's educational programming,^{24/} its broadcast of general audience programming with educational/informational value to children and the availability of educational/informational children's programming in the marketplace.

Furthermore, the scheduling of such programming should not be considered by the Commission as long as it is reasonably within the traditional 6 a.m. - midnight broadcast day. Any parent of a pre-schooler will tell you that a two-year-old is likely to be up early and that educational programming scheduled at 6 a.m. is a welcome means of keeping a small child gainfully occupied at that hour of the day, particularly on weekends. Any parent of a teenager will, similarly, tell you that educational programming broadcast late at night is a desirable alternative to other entertainment which is often aired at those hours.

^{24/} The Notice discounts the value of such programs. The Commission should instead acknowledge the educational/informational impact which such brief messages may have. Indeed, the children's advertising restrictions reflect Congress' recognition of brief messages' effectiveness. An educational vignette placed within a high-rated children's entertainment program can have far more positive impact than a longer format program which may not hold children's attention.

Moreover, the almost universal availability of VCR's^{25/} and the time-shifting ability they provide makes a program's scheduling almost irrelevant -- if a parent wants a child to watch a particular program, it is only necessary to record it and rebroadcast it at the desired time. VCR's have reduced to a point of insignificance the program scheduling concerns which might have been relevant twenty years ago.

Finally, the source of core and general audience programming should not be a factor in the Commission's evaluation of CTA compliance. The Commission has long recognized that it is the content, not the source of the program which is the critical determinant of its public service value.^{26/} The same considerations apply with respect to children's programming.

In sum, the Commission should not adopt quantitative children's educational/informational programming guidelines. Rather, it should provide specific

25/ TV & Cable Factbook No. 61, Services Volume at I-8 reports that in 1975 there were 30,000 VCR's in use in the United States. By 1992, that number had grown to 94,850,000, exceeding the total number of television households (91,788,100) reported by Arbitron in May, 1992. (Broadcasting & Cable Yearbook 1993 at C-224.)

26/ See, e.g., Newhouse Broadcasting Corp., 33 RR 2d 1514 (1975); Tupelo Broadcasting Co., Inc., 42 RR 2d 1163 (1978); WPIX, Inc., 43 RR 2d 278 (1978).

(but non-exclusive^{27/}) examples of programs which it considers would satisfy the requirement for the presentation of "core" children's programming, and explain the basis for their listing. It should provide similar -- and equally non-exclusive -- specific examples of the types of programs which would be considered as satisfying the obligation to air general audience programming with educational/informational value for children. It should evaluate each licensee's compliance with CTA's requirements on an individualized basis, looking at core programming, short-form educational/informational vignettes and general audience programming which also has educational/informational value for children and considering the particular circumstances of each licensee and its market.

Should the Commission nonetheless adopt quantitative guidelines, those guidelines should not relate merely to standard length core programming.^{28/} Rather, they should set forth various combinations of core vignettes and

acceptable, in order to implement Congress' direction that core programming not be the agency's sole regulatory focus and to maximize licensees' flexibility in this area. The amount of standard length core programming which the guidelines require should be reasonable,^{29/} and reflect a realistic evaluation of the economic situation facing the broadcast industry and other demands for licensees' broadcast time.^{30/} They should likewise take account of licensees which choose to satisfy their requirements through monthly or quarterly core programming specials with reduced weekly schedules of core programming.

Furthermore, any guidelines must recognize the value of short educational vignettes for children. Such brief, well-produced messages, can have a substantial

^{29/} One hour per week would appear to be reasonable. The suggestions that stations air three or more hours per week of core children's programming is, it is respectfully urged, unreasonable: there insufficient quality programming available in the market to make it possible for all television stations to effectively comply with such a requirement, and such an extensive requirement could result in diminution of service to other portions of a station's audience. (For example, most network affiliates air news during the morning and afternoon/early evening hours when children are likely to be in the audience.) Moreover, many stations air a substantial amount of general audience programming which satisfies children's educational needs and Congress directed such programming to be considered in establishing any guideline in this area.

^{30/} The Commission should also recognize that if its guidelines suggest, for example, airing one hour per week of standard-length core children's programming, that means that as a practical matter there will be at least six hours per week available in a six-station television market.

positive impact on children, particularly when aired in lieu of a commercial message within a popular children's entertainment program. A brief, intense message will frequently have more lasting impact on a child than a longer, more involved presentation.^{31/} Any guidelines which may be adopted should specifically consider such brief vignettes as contributing in a significant manner to compliance with a station's CTA obligations.

Finally, in recognition of the current ongoing development of quality core programming and the lack of specific Commission guidance or requirements,^{32/} any processing guidelines announced now should not become effective until Fall, 1994. This will afford licensees sufficient time to acquire the necessary programming and to adjust their schedules to accommodate the Commission's requirements.

^{31/} One need only look at the short segments which comprise "Sesame Street" to recognize the positive impact of brief educational messages.

^{32/} Renewal applications which were filed shortly after CTA became effective were granted if they reflected very little -- one-half hour per week -- of core programming; that does not appear to be the Commission's current processing policy.

The Commission Should Provide Additional Guidance
Concerning the Definition of Commercial Matter^{33/}

Although the Notice states that there has been a high degree of compliance with the CTA's commercial limits, licensees' implementation of those requirements has not been problem-free. Licensees have experienced particular difficulty in determining whether particular types of announcements, particularly promotional announcements, program promotional announcements and certain paid PSA, must be considered commercial matter. In the past when such problems have been encountered, the Commission has issued a series of questions and answers or a Primer which provides specific, case-by-case guidance to aid licensees' compliance.^{34/} It is respectfully requested that a similar set of questions and answers be issued to clarify treatment of certain types of promotional announcements for purposes of CTA's commercial limits.

^{33/} This section of the Joint Comments is submitted in response to the invitation in paragraph 10 of the Notice for the submission of comments "on any related issues that may assist us in better implementing the requirements and underlying objectives of the Children's Television Act."

^{34/} See, e.g., Applicability of Sponsorship Identification Rules, 40 FCC 141 (1963), modified, Public Notice (April 21, 1975), further revised, Public Notice, (September 3, 1975).

Among the matters which could be covered in such a document would be the following:^{35/}

-- Treatment of Program Promotional Announcements. A program promotional announcement does not have to be considered commercial matter if the sponsor's name is an inherent part of the program name.^{36/} The CTA Report indicates that a program promotional announcement must be considered commercial matter if it states that the program is "brought to you by [name of sponsor]." The Joint Parties submit that there is no logical difference between a program promotional announcement which indicates that the program is "brought to you by [name of sponsor]" and one which is for a program which includes the sponsor's name as part of the program title. Nor is there any logical difference between identifying the sponsor of a paid PSA -- which does not need to be considered commercial matter^{37/} -- and identifying the sponsor of a program in a promotional announcement. The extent and nature of the commercial identification is the same -- it is limited to naming the sponsor without further commercial information and it does not act overtly to sell. If the balance of the announcement is devoted to a description of the program's content, rather than the advertising message of the program's sponsor, it does not appear that the concerns about children's susceptibility to an advertising message which prompted the CTA are applicable. It is respectfully submitted that the Commission should hold that program promotional announcements which merely identify the sponsor of the program and otherwise describe the program are not to be considered commercial matter subject to the commercial limits. Further, if the Commission holds to the contrary, then the only amount of

^{35/} Should the Commission choose not to issue such a document, it is respectfully requested that it at least respond to the specific questions raised by the examples herein.

^{36/} See Instructions to FCC Form 303, Part II(1)(c)(ii), 41 Fed. Reg. 19567 (May 12, 1976).

^{37/} CTA Report at par. 7.

commercial matter which should be counted is the time devoted to identification of the sponsor.

-- Station Promotions. The Commission has indicated that the mere provision of a prize and its identification in connection with station promotions such as contests, etc., does not need to be considered commercial matter. This holding should be affirmed with examples.

Similarly, the Commission should clarify that merely identifying a commercial location at which entry forms for a station promotional contest may be obtained does not transform an announcement concerning the contest into a commercial announcement.

Finally, the Commission should clarify that it will not require a station promotional announcement to be treated as commercial material simply because a prize or premium is provided by an entity which also happens to be a station advertiser. Although if there is an express agreement that specific promotional mentions will be given in exchange for the prize donation, commercial treatment may be appropriate, there is a different situation if there is no such agreement and the station approaches a known entity -- an existing sponsor -- and asks for a prize donation without any express agreement for on-air mentions. A station promotion is designed to build the station's audience, and in many cases it is simply a matter of convenience to deal with an existing customer which is a known entity in developing promotional contests and similar activities. If there is no direct agreement for commercial mentions, the fact of an unrelated business relationship should not require treatment of station promotional announcements as commercial matter.

-- Host Selling. The Commission should clarify the extent to which children's program hosts may appear in commercials outside their programs to expressly permit such appearances. If a program host appears outside of his/her program, the context is clearly different and there is no violation of the in-program relationship which prompted the prohibition. Indeed, the Commission permits commercials for program-related characters

to air so long as they are not within or adjacent to the programs, and there is no logical or rational basis for different treatment with respect to live hosts. Moreover, to restrict the ability of children's program hosts to appear in other station programs or commercials would make it difficult to justify their fulltime employment and thus could discourage stations from developing children's programs which utilize live program hosts. It is one thing to restrict children's program hosts from commercial activities within or adjacent to their own programs but quite another to indicate that they may not engage in commercial activities outside those programs. The latter is clearly an overbroad prohibition.

Conclusion

The Commission should not attempt to quantify licensees' educational/informational programming obligations under the CTA. Rather, it should evaluate each licensee on an individual basis, according substantial deference to licensees' reasonable good faith discretion and following Congress' directions that all types of programming and non-broadcast efforts, not merely core programming, be considered in that evaluation. If quantitative guidelines are adopted, they should be set forth in a formal Policy Statement and should specify various combinations of means of compliance, in order to preserve licensees' flexibility in satisfying their statutory obligations and to implement Congress' direction concerning the value associated with non-core programming.

The Commission should also provide additional concrete examples of the types of announcements which will